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MONTANA SECOND JUDICIAL DISTRICT COURT
SILVER BOW COUNTY

GREGORY A. CHRISTIAN; *et al.*, Plaintiffs, v. ATLANTIC RICHFIELD COMPANY, Defendant.	CAUSE NO. DV-08-173 BN **ORDER DENYING ARCO'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES AS BARRED BY CERCLA and GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ARCO'S CERCLA PREEMPTION AFFIRMATIVE DEFENSES (11TH - 13TH)**

INTRODUCTION

On May 17, 2013, Defendant Atlantic Richfield Company ("ARCO") filed a Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA. On June 10, 2013, Plaintiffs have filed a Cross-Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th -13th). The Court heard oral argument on both motions on June 20, 2016.

For the reasons set forth below:

1. ARCO's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA is DENIED; and

2. Plaintiff's Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11^{th} -13^{th}) is GRANTED.

BACKGROUND

CERCLA was enacted in 1980 to ensure the cleanup of contaminated sites and eliminate threats to human health and the environment posed by uncontrolled hazardous waste sites. CERCLA sets forth a mechanism to clean up hazardous waste sites under a remediation-based approach. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA's principle aims are to effectuate the cleanup of hazardous waste sites and impose cleanup costs on responsible parties. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). CERCLA's overall objective is to "promptly remediate polluted sites to bring land back to its original uncontaminated condition." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 273 (Wisc. 2003).

The Anaconda Smelter Site ("Site") became a federal Superfund Site in 1983. *See* 48 Fed. Reg. 40,658 (Sept. 8, 1983). Plaintiffs' properties are encompassed within the Site. Plaintiffs allege that Atlantic Richfield and its predecessors damaged their property while conducting "a milling and smelting

operation located near the towns of Anaconda and Opportunity ... from 1884 to 1980."

Plaintiffs have pursued damages allowed under Montana tort law for Defendant's alleged trespass and nuisance, including restoration damages. Plaintiffs' have testified in depositions that the primary goal of this lawsuit is to have their properties restored. Plaintiffs have also disclosed expert CPA Thomas Copley, who has been retained to serve as a controller to oversee funds that are recovered by the Plaintiffs in this litigation for restoration damages and ensure that they be used for the cleanup of property.

LEGAL STANDARD

Summary judgment is an extreme remedy and should never be substituted for a trial if a material factual controversy exists. *Hajenga v. Schwein*, 2007 MT 80, & 11, 226 Mont. 507, 155 P.3d 1241. The party moving for summary judgment must demonstrate the absence of genuine issues of material fact. Only then, must the opposing party establish factual issues. *First Sec. Bank v. Jones*, 243 Mont. 301, 302, 794 P.2d 679, 681 (1990). All evidence must be viewed in the light most favorable to the party opposing summary judgment and all reasonable inferences drawn in their favor. *Oliver v. Stimson Lumber*, 1999 MT 328, & 22, 297 Mont. 336, 342, 993 P.2d 11, 16.

RATIONALE

ARCO seeks a ruling that CERCLA's timing of review provision (Section 113(h)) and CERCLA's inconsistent remedy provision (Section122 (e)(6)) bar Plaintiffs' claim for restoration damages. To bar Plaintiffs' claim, however, the Federal CERCLA provisions must preempt Plaintiffs' state common law for trespass and nuisance, which allows Plaintiffs to recover restoration damages. As recognized by the Montana Supreme Court in the context of a trespass and nuisance claim, like the one here:

> If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation.

Sunburst School Dist. No. 2 v. Texaco, 2007 MT 183 ¶ 34, 338 Mont. 259, 165 P.3d 1079 (*citing Roman Catholic Church v. Louisiana Gas*, 618 So.2d 874, 877 (La. 1993).

Preemption is the only way a federal law may bar recovery pursuant to state common law. *Pritchard Petroleum v. Farmers Co-Op. Oil & Sup. Co.*, 121 Mont. 1, 15, 190 P.2d 55, 63 (1948) ("A statute does not take away common law claims except to the extent that the statute expressly or by necessary implication declares.").

1. CERCLA Does Not Preempt Plaintiffs' Right to Recover Restoration Damages Pursuant to Montana's Common Law.

CERCLA does not expressly preempt Montana's common law, which allows for the recovery of restoration damages. *See New Mexico v. General Electric Co.,* 467 F.3d 1223, 1244 (10th Cir.2006) ("[w]e may safely say Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination.").

In fact, CERCLA contains three separate savings provisions preserving the right to impose additional liability for the release of a hazardous substance, one of which provides:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, **including common law**, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

42 U.S.C. § 9652(d) (emphasis added). The principle purpose of § 9652(d) "is to preserve to victims of toxic waste the other remedies they may have under federal or state law." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998) (citing *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 n. 8 (9th Cir. 1995)). Inclusion of these CERCLA savings provisions makes clear that Congress

did not intend to preempt state causes of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 (1983).

In the absence of express preemption, which is not present here, a federal statute may impliedly preempt a state law in two ways. First, if Congress intends that federal law should entirely occupy a particular field, state laws in that field (such as the common law right to recover restoration damages) are preempted. *California v. ARC America Corp.*, 490 U.S. 93, 100, (1989).

As stated above, Congress had no intention of occupying the fields of property law or environmental clean-up by passing CERCLA. Nor did Congress intend to preclude state law claims or damages such as those at issue in this case. Various courts have found that Congress did not preempt state laws related to hazardous waste contamination. *Fireman's Fund Ins. v. City of Lodi,* 302 F.3d 928, 941-43 (9th Cir.2002) ("Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem."); *United States v. Colorado,* 990 F.2d 1565, 1575 (10th Cir.1993); *accord Manor Care, Inc. v. Yaskin,* 950 F.2d 122, 125-26 (3d Cir.1991) (Alito, J.).

Second, if Congress does not intend to occupy the field, a state law may be preempted by federal law to the extent that it actually conflicts with federal law. *California v. ARC America Corp.*, 490 U.S. 93, 100, (1989). Allowing Plaintiffs to

pursue restoration damages as allowed by Montana's common law would not conflict with CERCLA §113(h) or §122(e)(6). Actual conflict between state and federal law occurs "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir.2000). For conflict preemption to apply, the common law remedy must be a "material impediment to the federal action, or thwart [ ] the federal policy in a material way." *Id.* at 796 (quoting *Mount Olivet Cemetery Assoc. v. Salt Lake City,* 164 F.3d 480, 489 (10th Cir.1998)).

In this case, recovery of restoration damages by the Plaintiffs would not stand as an obstacle to Congress's objectives in passing CERCLA or to the CERCLA cleanup underway. The EPA has required ARCO to remove soil containing more than 250 ppm of arsenic or 400 ppm lead from all residential property within the Superfund site and to remove soil exceeding 1,000 ppm of arsenic from all pasture property. The EPA has not required ARCO take any action with respect to arsenic, lead or any other contaminant in groundwater.

Plaintiffs intend to remove all of the arsenic and other heavy metal contaminants left in their groundwater and from the upper two feet of the soil on their properties. Plaintiffs' common law property damage claims do not make it

"impossible" for ARCO to comply with the EPA's requirement. Nor do Plaintiffs' common law claims impede the CERCLA framework or EPA's requirements on site. While ARCO is currently remediating portions of a minority of Plaintiffs' residential yards due to the results of testing performed in the course of this litigation, ARCO represented at oral argument that this cleanup will be finished before the trial scheduled on November 1, 2016. No further cleanup is contemplated by ARCO. Plaintiffs' restoration plan as to these properties, therefore, will not interfere with any ongoing or proposed CERCLA mandated cleanup.

2. Plaintiffs' Common Law Claim is Not a Proscribed "Challenge" to the EPA-Selected Remedy.

ARCO argues next that, regardless of whether CERCLA preempts Montana's common law right to recover restoration damages, this Court does not have jurisdiction over Plaintiffs' claim for restoration damages because Plaintiffs' restoration plan is a prohibited "challenge" to the remedial action selected by the EPA, citing CERCLA's "timing of review provision," §113(h).

Section 113(h) states:

> No federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9606(a) of this title[.][1]

[1] Plaintiffs admit that exceptions 1-5 to §113(h) are inapplicable.

42 U.S.C. § 9613(h).

In order to invoke the timing of review provision to block Plaintiffs' state law claim for restoration damages, ARCO is required to demonstrate that Plaintiffs' common law suit for trespass and nuisance is a "challenge" to the remedial action selected by the EPA, which is set forth in the Record of Decision ("ROD"). ARCO cannot satisfy this requirement. Claims are interpreted as a "challenge" pursuant to § 113(h) only if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup. *ARCO Environmental Remediation, LLP (AERL) v. Dept. of Health and Environmental Quality of Montana,* 213 F.3d 1108, 115 (9th Cir. 2000).

In this case, Plaintiffs do not seek to alter the ROD or change any of the requirements that the EPA has imposed upon ARCO. Instead, Plaintiff seeks to recover restoration damages and perform the cleanup themselves.

ARCO cites several extra-jurisdictional cases which it contends compel a determination that Plaintiffs' common law claims are a challenge to the EPA-selected remedy. However, all of the cases cited by ARCO are distinguishable in that none involve a private landowner whose common law claim for restoration damages was considered a proscribed challenge to the EPA selected remedy. For example, ARCO cites *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir.2006). In that case, the plaintiff was not a private landowner but instead

represented the state's broader sovereign and public trust. Further, and unlike the Plaintiffs' claim here, the claim was pled and characterized by New Mexico not as a common law claim, but instead as "residual to a CERCLA remedy." *Id.* at 1249. New Mexico brought suit because the EPA "abandoned the ROD and required remediation of only the shallowest portion of the total plume." *Id.* New Mexico's claim was, in essence, a CERCLA NRD claim, which is created by the CERCLA statutory scheme and which *is* affected by the CERCLA timing of review provision. In dismissing New Mexico's claim, the *Gen. Elec.* court stated, "[t]his is not to say the State's public nuisance and negligence theories of recovery are completely preempted... Rather, the remedy the state seeks to obtain through such causes of action – an unrestricted award of money damages – cannot withstand CERCLA's comprehensive NRD scheme." *Id.* at 1248.

ARCO also relies on *Razore v. Tulalip Tribes of Wash.*, 66 F.3d. 236 (9th Cir. 1995). In *Razore*, the plaintiff formerly operated a landfill on property owned by the defendant tribe. *Id.* at 238. The landfill was declared a CERCLA site and Razore was a principal Potentially Responsible Party (PRP) required to pay for the EPA cleanup. *Id.* Prior to the EPA initiating cleanup, Razore sued the tribe, attempting to require the tribe to take immediate remedial action that would, in turn, limit the cost Razore would ultimately be required to pay. *Id.* at 239.

Section 113(h) barred Razore's claim as a challenge to the CERCLA remedy. Because it was not a property owner and was, in fact, responsible for the pollution in the first place, Razore could not sue the tribe under Washington's common law. *Id.* Instead, Razore alleged the tribe's landfill was in violation of the federal Resource Conservation and Recovery Act (RCRA) and the federal Clean Water Act (CWA). *Id.* Neither RCRA nor CWA could be enforced in that manner by a private party such as Razore. *Id.* Therefore, Razore did not have a cognizable claim that could be preserved by CERCLA's savings provision. *Id.* at 240.

ARCO also relies on *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995). *McClellan* is distinguishable because that case involved a public interest group's suit in federal court seeking to enforce federal environmental regulations. The public interest group alleged that RCRA and CWA were not being complied with during the CERCLA mandated cleanup. *Id.* at 326. The court found that the management plan effectuated by the EPA required compliance with both RCRA and CWA. *Id.* Therefore, a suit alleging that those federal regulations were not being complied with was a challenge to the CERCLA cleanup. *Id.*

The Court does not find ARCO's reliance on these cases persuasive. Further, ARCO's interpretation of §113(h) conflicts with the plain language of the CERCLA savings provision, which states:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants…

42 U.S.C. § 9652(d).

The CERCLA statute must be interpreted as a whole. *Montana Sports Shooting Ass'n, Inc. v. State, Montana Dept. of Fish, Wildlife, and Parks*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003, 1006. If the statutory language is not clear and unambiguous, courts look to legislative effect and give effect to the legislative will. *Id.*

The language of §113(h) does not clearly and unambiguously prohibit common law trespass and nuisance claims where the plaintiff seeks restoration damages. Further, to read §113(h) as a prohibition on common law claims for restoration damages creates a possible incongruity with the savings provision, 42 U.S.C. § 9652(d). The legislative history, however, describes the legislative will and intent behind §113(h).

The Congressional Committee of Conference that drafted the 1986 amendments to CERCLA explained that the "[n]ew section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants." H.R. Conf. Rep. No. 99-962, at 224). The Senate agreed to this Committee of Conference Report. *Bernice Samples v. Conoco, Inc.,* 165 F.Supp.2d

1303, 1312 (N.D. Florida, 2001) *citing* 132 CONG. REC. 28, 406, 28, 456 (1986). Senator Stafford "who insisted upon stating expressly what all had agreed was their intent," provided additional explanation of the "purpose and meaning" of the provisions in § 113:

> The time of review of judicial challenges to cleanups is governed by 113(h) for those suits to which it is applicable. It is not by any means applicable to all suits. For purposes of those based on State law, for example, 113(h) governs only those brought under State law which is applicable or relevant and appropriate as defined under Section 121.[2] In no case is State nuisance law, whether public or private nuisance, affected by 113(h).

Bernice Samples at 1312 citing 132 CONG. REC. 28, 410. Senator Mitchell echoed Senator Stafford, explaining that "[s]tate nuisance suits would, of course, be permitted at any time." *Bernice Samples* at *Id.* at 1312 citing 132 CONG. REC. at 28, 429.

The House of Representatives also agreed to the Committee Conference Report on the 1986 CERCLA amendments. Representative Glickman clarified the intended interplay between § 113(h) and state law claims such as those maintained by Plaintiffs here:

> Section 113(h) does not affect the ability to bring nuisance actions under State law for remedies within the control of the State courts which do not conflict with the Superfund legislation. The language preserving State nuisance actions in a limited manner is intended to preserve the use of State enforcement authority to compel private

[2] This sentence applies to enforcement actions that require state government standards be incorporated and enforced by the EPA in the CERCLA clean-up and is not applicable here.

> party cleanup or to otherwise assure that the State or private party citizens can continue to abate nuisances resulting from hazardous waste disposal when such actions do not conflict with CERCLA.

Bernice Samples at 1314 *citing* 132 CONG. REC. 29, 737 (1986).

Congress' intent in passing §113(h) was, therefore, not to bar claims such as that brought by Plaintiffs in this case, which do not conflict with CERCLA for the reasons set forth above.

3. CERCLA § 122(e)(6) Does Not Apply to Plaintiffs' Claims.

ARCO also argues that Plaintiffs are barred from pursuing their state law claim for restoration damages by CERLA's "inconsistent response" action section (§ 122(e)(6)). ARCO submits that Plaintiffs are Potentially Responsible Parties (PRPs), and Plaintiffs' claims for monetary restoration damages qualify as an "inconsistent response" to CERCLA. ARCO's argument must be rejected for three reasons.

First, as explained above, CERCLA does not preempt Plaintiffs' common law claims for nuisance, trespass, negligence and strict liability. Section 122(e)(6) cannot preclude Plaintiffs from recovering for restoration damages where CERCLA does not preempt Montana's common law.

Second, Plaintiffs, as private landowners, are not PRPs as contemplated by CERCLA. The Site was declared a Superfund site 33 years ago and ARCO has failed to show that any of the Plaintiffs, or any other private landowner in

Opportunity or Crackerville have been declared PRPs. The cases cited by ARCO relate to successor liability or contribution situations in which parties have inherited a business or have otherwise become involved in the polluting business, and are subsequently named PRPs.

Third, even if Plaintiffs' had been declared to be PRPs by the EPA, Plaintiffs' state law restoration claims are not "inconsistent with" EPA's final remedy. Therefore, §122(e)(6) does not apply. Under CERCLA § 122(e)(6), Congress only forbade remedial actions by PRPs that are inconsistent with the ROD without EPA's approval. "This provision is to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." *Interfaith Comm. Org. v. Honeywell Intern, Inc.*, 2007 WL 576343 * 3 *quoting* 132 CONG. REC. S14919 (daily ed. Oct. 3, 1986). This section is part of CERCLA's overall objective to "promptly remediate polluted sites to bring land back to its original uncontaminated condition," and impose liability on "the parties responsible for the polluted condition of the land." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 273 (Wis. 2003).

Plaintiffs' restoration plan is not inconsistent with the EPA selected remedy, nor would it exacerbate the pollution issue in Opportunity and Crackerville. Plaintiffs seek to remove all of the pollution left on Plaintiffs' personal property by

the Anaconda Smelter. "CERCLA sets a floor, not a ceiling." *New Mexico*, 467 F.3d at 1246. As evidenced by the savings provisions, CERCLA contemplates additional state actions for cleanup that may exceed the EPA mandated action for a property. Congress even contemplated the situation where a private party receives funds from a polluter for restoration damages on a site regulated by CERCLA, and precludes that private individual from double recovery of the same costs through a CERCLA action. *See* 42 U.S.C. § 9614(b).

While ARCO suggests that the Plaintiffs' restoration plan would conflict with ongoing EPA investigation and cleanup, it has failed to carry its burden to demonstrate the absence of genuine issues of material fact. According to ARCO's expert and Rule 30(b)(6) designee, Richard Bartelt, prior to the filing of this action, the remediation required by EPA under CERCLA had already been completed by ARCO. As a result of the filing of this lawsuit, ARCO conducted additional sampling on every Plaintiffs' property, and now acknowledges contamination exceeding the regulatory level for arsenic in soil remains on some of the Plaintiffs' properties. At oral argument, the Court was informed that ARCO plans to remove contaminated soil on twenty-four of the Plaintiffs' properties, however, none of the Plaintiffs will have the entirety of their yards cleaned up. The work began in June, 2016 and is scheduled to be finished before the start of trial in November, 2016. No restoration of groundwater is contemplated.

CONCLUSION

For the foregoing reasons, the Court does not find that the CERCLA provisions raised by ARCO should bar Plaintiffs from the recovery of restoration damages.

IT IS HEREBY ORDERED that Defendant Atlantic Richfield Company's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA is **DENIED** and Plaintiffs' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th -13th) is **GRANTED.**

DATED, this 30th day of August, 2016.

Hon. Katherine M. Bidegaray
DISTRICT COURT JUDGE